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Supreme Court of the United States

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

Appeal from the Supreme Court of the State of Michigan.

REPLY BRIEF OF DETROIT INTERNATIONAL BRIDGE COMPANY

The appellant, Detroit International Bridge Company, has asserted under its Assignment of Errors (1) and (2), that it is not subject to the annual privilege tax imposed by the State of Michigan. This position is based upon the contention that the State of Michigan has no power to apply the annual privilege tax upon a corporation, such as the appellant, for the privilege of doing business, when the only business which appellant corporation might do under its corporate charter is exclusively that of engaging in foreign commerce.

However, counsel for the appellee, Corporation Tax Appeal Board of the State of Michigan, in their brief

confuse the issue. The cases cited, and relied upon, by counsel for the appellee do not extend to the question of whether or not the state imposing the annual tax upon the corporation in question was vested with the power so to do. In all of the cases relied upon by appellee, the corporations either had power to do or were actually doing a local business within the taxing state. The power to impose the privilege tax was not questioned. The only issue before the court in those cases related to the method of computation. The court in those cases, relied upon by appellee, determined not that the state had power to impose the privilege tax, but rather the narrower question of whether the method of computation, the yard stick for measuring the tax and the privilege exercised, was proper or not. In the case at bar, the appellant, Detroit International Bridge Company, contends that the State of Michigan is without the power to impose the annual privilege tax upon it at all. Under Assignment of Errors (1) and (2), with which we are primarily concerned, the method of computation of the tax is not involved. That question is involved in the case at bar only if the court were to determine that the State of Michigan has the power to impose the tax upon appellant, which we deny, and is discussed in our brief under Assignment of Errors (3).

In order to clarify the issues, in view of the discussion in the brief of appellee, we believe that a concise restatement of appellant's position, distinguishing the authorities relied upon by appellee, would be helpful.

Appellant, Detroit International Bridge Company, questions the power of the State of Michigan to impose upon it the annual privilege tax for the year 1933, for the period from August, 1933, to September, 1934, prescribed under Act No. 85 of the Public Acts for 1921, as amended

by Act No. 175 of the Public Acts for 1929, Section 4, of the State of Michigan. We contend that the appellant is not subject to this tax at all. This annual privilege tax has been and must be clearly distinguished from the franchise tax imposed by the State of Michigan upon corporations upon their organization. The organization or franchise tax imposed by Section 3 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 33 of the Public Acts of 1927, of the State of Michigan, was paid by appellant corporation upon its incorporation in 1927. This organization or franchise tax (which is not here involved) was imposed for the privilege of being, or continuing to be, a corporation. It is a tax which was chargeable for the privilege of being, which belongs to the incorporators and permits the individuals to act in a corporate form in the State of Michigan. There is no other franchise or privilege tax under the laws of the State of Michigan which might be imposed upon appellant as a Michigan corporation for the privilege of *continuing to be* a Michigan corporation, as there was in the case of *Kansas City Ry. Co. v. Botkin,* 240 U. S. 227, relied upon by appellee. Once the organization or franchise tax has been paid there can be no further imposition of a franchise or privilege tax for the privilege to be or to continue to be. The proceeds of this organization or franchise tax, which appellant paid upon organization, under the Act and under the Constitution of Michigan is credited to the school fund of the State.

The annual privilege tax, Section 5 of Act No. 85 of the Public Acts of 1921, as amended by Section 4 of Act No. 175 of the Public Acts of 1929, of the State of Michigan (here involved), is for the privilege of doing business—for the privilege of exercising the corporate franchise. It is a tax imposed for a privilege granted to the cor-

poration, that is, for the privilege of exercising the corporate franchise (as distinguished from the privilege *to be* granted to incorporators). And the corporate franchise which the corporation is privileged to exercise is determined by its charter. The only business which appellant was permitted to do under its charter during the taxable period in question was to operate and maintain an international highway bridge—to engage in foreign commerce.

Under this statute (Act No. 175 of the Public Acts of 1929), the provisions of this tax are credited to the school fund. The Michigan Supreme Court has held that the annual privilege tax cannot, in view of the Michigan Constitution, be held to be a tax for the privilege of *being* or *continuing to be,* because if that were the nature of the tax the proceeds under the statute are payable to the general fund where taxes for the privilege of being or continuing to be must be paid, whereas the annual privilege tax (here involved) is payable to the general fund.

The nature of the annual privilege tax has been clearly defined and distinguished from the organization or franchise tax for the privilege of *being* or *continuing to be* in the case of *Union Steam Pump Sales Corp. v. Secretary of State,* 216 Mich. 261.

Thereafter in the case of *In Re G. H. Hammond Company,* 246 Mich. 179, the Michigan court held that so long as a Michigan corporation had the power under its charter to do a business within the State of Michigan it was subject to the payment of this annual privilege tax, even though it did not elect to exercise that privilege during the following year for which the tax was payable. After the *Hammond* case the annual privilege tax was amended by Act No. 175 of the Public Acts of Michigan for 1929, Section 4, so as to specifically provide what the court had

declared the law to be in the *Hammond* case. The following additional language was added to the statute in the 1929 amendment:

> "It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

Thereafter the Michigan court in the case of *Cobbs & Mitchell v. Corporation Tax Appeal Board,* 252 Mich. 479, and this court in the case of *People of the State of Michigan v. Michigan Trust Co.,* 286 U. S. 334, followed the rule of the *Hammond* case and the statutory amendment of 1929.

It is now established law that the annual privilege tax here involved is imposed upon a domestic corporation for the privilege of "exercising its franchise and of transacting its business within the State", and if a Michigan corporation has power to do a local business it is subject to this annual privilege tax, even though it does not elect to exercise that privilege during the taxable period.

However, the *Michigan Trust Co.* case, the *Hammond* case, the *Cobbs & Mitchell* case and the 1929 statute, with its new amendment, do not have application in the case at bar, because the appellant corporation does not have the power under its corporate charter to do a local business at all. The only franchise which appellant corporation has the power to exercise is that of operating and maintaining an international highway bridge, which is the power or privilege to engage in foreign commerce. It has no other franchise or privilege which it might exercise, and to impose a tax upon appellant corporation for the

privilege of exercising the only franchise which it might exercise, that is, to engage in foreign commerce, is to impose a tax upon appellant for the privilege of engaging in foreign commerce, which is in violation of the Commerce Clause of the Federal Constitution.

The *Michigan Trust Company* case would only have application if the appellant, Detroit International Bridge Company, in the case at bar had power to do a local business, regardless of whether appellant exercised that privilege or not. Under its corporate charter appellant has no power to engage in any other business, but that of operating and maintaining an international highway bridge, that is to engage in foreign commerce. As has been pointed out in our first brief in this case, at page 46, this court in the case of *Anglo-Chilean v. Alabama,* 288 U. S. 218, distinguished that case from the *Michigan Trust Company* case on the ground that the Alabama statute was imposed upon the actual doing of business in Alabama, while under the Michigan statute, the annual privilege tax was imposed for the privilege of doing business whether that privilege was exercised or not. This basis for distinguishing those two cases does not govern in the case at bar. The appellant corporation has no power to do a local business and therefore it cannot be subjected to a tax for a privilege which it cannot exercise under its corporate charter, just as the corporation in the *Anglo-Chilean* case could not be subjected to a privilege tax for the doing of business when it never engaged in business in Alabama. If the appellant corporation in the case at bar had the power to engage in a local business as did the corporation in the *Michigan Trust* case, the *Anglo-Chilean* case might be distinguished. However, since appellant can engage in no local business it cannot be subjected to the tax for the privilege of doing a local

business, which privilege it has not the power to exercise under its corporate charter. In view of these facts in the case at bar, the *Anglo-Chilean* case is strong authority in support of appellant's position.

APPELLEE'S THEORY NOT APPLICABLE TO CASE AT BAR

Appellant contends that the State of Michigan has no power to subject it to the annual privilege fee here involved. Counsel for the appellee do not treat with this question at all. The cases cited by Counsel for the appellee treat with questions of computation or measurement of privilege taxes where the power of the State to impose the tax is not involved. The cases cited on this question by the appellee have no present application. We admit that under the cases of *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Educational Films Corp. of America v. Ward*, 282 U. S. 379; *Pacific Co. v. Johnson*, 285 U. S. 480; and *Home Insurance Co. v. New York*, 134 U. S. 594, that a state may impose an annual privilege tax upon a domestic corporation having *power* to do a local business within the taxing state, and include in the computation of the privilege tax items of property or income which of themselves are otherwise exempt and not subject to a direct property tax by the state (such as tax exempt bonds, royalties from copyrights granted by the United States, and income from tax exempt property where the computation is based upon income) as a means of measuring the privilege enjoyed or granted. The court in those cases pointed out that the tax involved was a privilege tax and was not a direct property tax, that the inclusion of otherwise tax exempt property was merely a yard stick to measure the privilege which is being taxed, but that the items themselves were not being taxed as property. Those cases only

have application where the corporation taxed has some power to do a local business and the privilege to engage in this local business may indisputably be taxed by the state. The question involved in those cases was merely the propriety of the method of computing or measuring the privilege which is being taxed.

In the case at bar, we are not primarily concerned (under Assignment of Errors (1) and (2))with the method of computing or measuring the tax. We contend on behalf of the appellant corporation that it has no privilege of doing a local business, and the only power which it may exercise under its corporate charter is that of engaging in foreign commerce, which is neither grantable by the State of Michigan, nor taxable by it.

The case of *Kansas City Ry. Co. v. Botkin,* 240 U. S. 227, has no application in that the tax there involved was for the privilege of being or continuing to be a corporation (distinguished from the case at bar where the annual privilege tax is for the privilege of doing or exercising the corporate franchise). And furthermore the question there involved was not primarily the power of the state to impose the tax, but rather the method of computing the tax. The computation of the tax in the *Kansas City v. Botkin* case was made upon paid-up capital and surplus, part of which represented investments in property and roads out of the state upon which the state could not impose a direct property tax. This court held in that case that the inclusion of this capital and surplus was merely a means of measuring the privilege granted and was not a direct tax upon the property used in business out of the state or in interstate operations.

The case of *United States Glue Co. v. Oak Creek,* 247 U. S. 321, is based upon similar reasoning to the other

above cases relied upon by appellee. In this case the State of Wisconsin imposed an annual privilege tax upon a domestic corporation for the privilege of doing business, computing or measuring that privilege by the net profits derived from its business intrastate and interstate. The corporation had the power to do a local business under its charter, and did engage in a local business. The court in that case held that since the state had the power to impose an annual privilege tax upon the domestic corporation for the privilege of engaging in a local business that the state might measure this privilege and compute the tax by all of the income of the corporation. The court held that the tax was not a direct tax upon the interstate or out-of-state commerce, or upon property used in connection therewith, but was merely a measure to determine the privilege granted and taxed. The state there had the power to impose the tax upon the corporation since the corporation had the corporate power under its charter to engage in a local business. The question determined by the court was the validity of the method of computing the tax for the privilege granted. In the case at bar, we submit that appellant corporation has no power to engage in a local business, and since the only power which is does have under its corporate charter is one which would permit it to engage in foreign commerce it cannot be subjected to a privilege tax for this privilege by the State of Michigan.

The cases of *Hump Hairpin Co. v. Emmerson*, 258 U. S. 290, *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, and *National Leather Co. v. Massachusetts*, 277 U. S. 413, also involved the method of computing the privilege tax where a state, however, applied the tax to foreign corporations. In all of these cases, the court has held that it is proper for the taxing state to include

in the computation of this privilege tax interstate income or net profits derived without the taxing state so long as the method of prorating or allocating the percentage which is attributable to the taxing state is fair and equitable. In each of these cases the foreign corporations were engaged in a local business within the taxing state, and there is no question directed to the power of the state to impose the tax. Only the method of measuring or computing the tax was involved. In the case at bar, appellant questions the power of the State of Michigan to apply the tax to it at all.

Both the Michigan Supreme Court, below, and the appellee rely upon the decision in the case of *In Re Detroit & Windsor Ferry Company*, 232 Mich. 574, in which are cited many of the cases relied upon by the appellee, discussed hereinabove and distinguished from the case at bar. As was pointed out in our first brief on pages 53-56, the decision in the *Detroit & Windsor Ferry Company* case might be supported on the grounds that in that case the Michigan corporation there involved had the power to do a local business and did engage in a local business. All of its property was located within the State of Michigan. And since the Detroit & Windsor Ferry Company had the power to do a local business under its charter, the State of Michigan could impose the annual privilege tax upon this privilege to engage in a local business, even though the corporation also engaged in foreign commerce.

To measure this privilege to do business within the State of Michigan, the state could include in the computation all of the capital and surplus of the Detroit & Windsor Ferry Company, even though some of the property was used at times in foreign commerce. The tax was not there imposed directly upon the property which sometimes was used in foreign commerce, but that prop-

erty was merely included in the computation to measure the privilege taxed, that is the privilege of doing a local business which the corporation had the power to do under its charter. In that connection, many of the above cases now relied upon by appellee were cited by the court, and properly so, in the *Detroit & Windsor Ferry Company* case.

However, that case is clearly distinguishable from the case at bar in that appellant, Detroit International Bridge Company, in the case at bar has no power under its charter to do a local business, and, therefore, the State of Michigan has no power to impose an annual privilege tax for the privilege of doing a local business. Nor can the State impose this tax upon appellant for the privilege of engaging in foreign commerce. And since the state has no power to impose the tax, the above authorities cited in the *Detroit & Windsor Ferry Company* case and now relied upon by appellee have no application, because they all deal with questions having to do with the method of computation of the tax rather than the power of the state to impose the tax.

But when the Michigan Supreme Court in its decision in the case at bar, below, cites the *Detroit & Windsor Ferry Company* case in support of the proposition that the State of Michigan would have the power to impose a tax upon the Detroit & Windsor Ferry Company even if the only power granted to the corporation there under its charter were to engage exclusively in foreign commerce, and refuses to distinguish that case from the case at bar because in that case the corporation had power to do a local business, that position cannot be sustained by the authorities any more than can the case at bar.

It is the position of the appellant that the State of Michigan is without power to impose this annual privilege tax

for a privilege which the appellant has no power to exercise. To impose the tax would be to violate the Commerce Clause of the Federal Constitution and would be contrary to the decision of this court in the cases of *Philadelphia Steamship Co. v. Pennsylvania,* 122 U. S. 327, and *Ozark Pipe Line Co. v. Monier,* 266 U. S. 555.

Counsel for appellee in their brief argue that appellant by voluntary action has amended its Articles of Incorporation and limited its purpose clause and its powers in an attempt to avoid the imposition of the annual privilege tax. Under the Articles of Incorporation of appellant as originally filed on June 21, 1927, the power of the Company was limited solely to the construction, ownership and operation of this international highway bridge (R. 19). A few months later Article III of the Articles of Incorporation of the appellant was amended so as to expressly provide for the acquisition and maintenance of real estate, which it believed were purely *incidental* powers of any corporation, without extending the primary purpose of owning, operating and maintaining this international highway bridge (R. 19, 22). Appellant then contended that these powers were merely incidental to the primary purpose, and in the case before this court, 287 U. S. 295, counsel for the Corporation Tax Appeal Board for the first time disputed this contention of appellant, and this court at that time did not consider the case on the merits, and stated that appellant had "failed to establish that it had no power to carry on any business that is not within the protection of the Commerce Clause". Those proceedings and the proceedings in the case at bar are carried up by certiorari from the Corporation Tax Appeal Board to the Supreme Court of Michigan. The statement of facts contained in the petition for the writ of certiorari on that appeal, which are not disputed, must be accepted as true.

However, in order to obviate any such contention again being raised, the appellant amended the purpose clause of its Articles of Incorporation on May 3, 1933, limiting the power of the corporation to the ownership and maintenance of this international highway bridge, in substance similar to the purpose clause in the original articles of association (R. 7). The corporation has no other power or purpose whatsoever. This is indisputable. This fact was clearly set forth in appellant's petition for writ of certiorari to the Supreme Court of Michigan, paragraph (3) (R. 2), and appellee has at no time in the proceedings contended to the contrary.

It is the sole purpose and power of appellant to operate and maintain this international highway bridge. Under the Corporation Laws of Michigan, the corporation may amend its Articles even though by so doing it no longer seeks to engage in a local business. A Michigan corporation may by appropriate vote amend its Articles of Association. It may reduce its capital structure when the original authorized and outstanding stock is no longer required, even though the corporation by this voluntary action reduces its annual privilege tax. The Secretary of State and appellee have never contended to the contrary. Nor is there anything unholy about appellant's amending its Articles so as to give up a power to do a local business (if appellant ever had such a power, which we deny) when appellant neither requires or seeks to exercise such power, even though by so doing the annual privilege tax is avoided. As the Michigan court said in the case of *Auditor General v. Bassett's Estate*, 246 Michigan, 440, at page 449:

> "On the other hand, it is lawful for a person to use such means as the law provides for the

purpose of reducing the burden of his taxes, if the means be not a mere subterfuge to defeat proper and valid assessment."

Appellant cannot be subjected to the payment of a tax, which was payable in advance, in August of 1933, for the period to September 1934 (*In Re Johnston Newton Co.*, 226 Mich. 40), for the privilege of doing a local business when it did not either seek or have the power under its charter to do a local business during the taxable period in question.

Nor does Section 10 of Act No. 327 of the Public Acts of Michigan for 1931 (General Michigan Corporation Code), referred to on pages 7-9 of counsel for appellee's brief, extend the corporate powers so as to permit it to engage in a local business which is not purely incidental and necessary to the carrying out of the foreign commerce. As has been pointed out on pages 53-54 of our brief, a corporation only possess the right to engage in such business operations as are expressly enumerated in its charter or Articles of Incorporation. The Michigan decisions (cited in our brief) have confined the operations of a corporation to these enumerated powers to the exclusion of other powers. The powers set forth in Section 10 of the General Corporation Law are not local powers which appellant may exercise apart from the general purpose of the corporation. Section 10 does not extend the purpose or powers of appellant corporation but only expressly states, what has generally been the law, that these incidental powers may be exercised incidentally to and in furtherance of the purpose of the appellant corporation as specified and limited in its Articles of Incorporation. Under its charter appellant can only operate and maintain this international highway bridge from Detroit to Canada,

that is to engage in foreign commerce, and the incidental powers mentioned in Section 10 can only be exercised in furtherance of the purpose limited in and the power granted under its Articles of Incorporation. Appellee does not and cannot seriously contend otherwise.

CONCLUSION

We respectfully submit that the State of Michigan is without power to impose the annual privilege tax here in question upon Detroit International Bridge Company, the appellant, for the privilege of exercising its corporate franchise and doing business within the State since the appellant under its corporate charter has no power to engage in a local business and is limited thereunder to the operation and maintenance of an international highway bridge, which is engaging in foreign commerce. For the State of Michigan to impose this tax upon appellant is to impose a tax upon appellant for the privilege of engaging in foreign commerce. We respectfully submit that the Judgment of the Supreme Court for the State of Michigan should be reversed.

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